In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief for the Petitioner.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported at 391 A. 2d 1158 (1978) (Pet. App. 1a-29a).

Jurisdiction.

The decision of the Supreme Court of Rhode Island was entered on August 9, 1978 (Pet. App. 1a). A motion for leave to petition for reargument out of time was denied by the Supreme Court of Rhode Island on December 21, 1978. This Court granted two extensions of time in which to petition for a writ of certiorari, thereby extending the time in which to file the petition to and including January 6, 1979. The petition for writ of certiorari was filed on January 5, 1979, and was granted on February 26, 1979. Two extensions of time in which to file the brief of the petitioner on the merits and the appendix were granted, thereby extending the time in which to file the brief and appendix to and including May 21, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether the Supreme Court of Rhode Island used the correct federal constitutional standards in excluding a shotgun from evidence after concluding there was an improper interrogation and no intelligent waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where an arrested suspect, minutes after receiving and asserting his *Miranda* rights, volunteered to help police recover the shotgun upon overhearing a conversation between two patrolmen to the effect that the shotgun was probably hidden near an area school, and, in fact, helped recover the shotgun after once more receiving but then relinquishing his *Miranda* rights.

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

Prior Proceedings.

On November 12, 1975, after a jury trial, Thomas J. Innis was found guilty of kidnapping, robbery, and murder in the first degree, in violation of R.I. G.L. (1969 Reenactment) §§ 11-26-1, 11-39-1, 11-23-1, respectively.

Prior to the impanelling of the jury, defense counsel made an oral motion to suppress a shotgun which had been found by the police with the respondent's assistance at the time of arrest (A. 3-4). The trial judge and counsel agreed to conduct the suppression hearing at the appropriate time during the trial (A. 5). When the State offered to introduce the shotgun into evidence, the jury was sent out and a *voir dire* was conducted (A. 8-10).

At the conclusion of the *voir dire* (A. 11-61), the trial judge made findings of fact and conclusions of law (A. 62-63). The court denied the respondent's oral motion to suppress the shotgun (A. 63). The respondent's exception was noted (A. 63).

On appeal, the Supreme Court of Rhode Island reversed and set aside the trial judge's ruling on the admissibility of the shotgun. *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978) (Pet. App. 1a-29a). The case was remanded to the lower court for a new trial.

Statement of Facts.

On January 16, 1975, the body of John Mulvaney, a cab driver, was found in a shallow grave in Coventry, Rhode Island (A. 5-6). The cab company dispatcher had last heard from Mulvaney at approximately 10:25 P.M. on January 12, 1975 (A. 7). Death had resulted from a shotgun blast to the back of the head (A. 6-7). The facts as elicited during the trial and the *voir dire* (A. 11-63) may be summarized as follows.

On January 16, 1975, shortly after midnight, the Providence police received a phone call from a cab driver, Gerald

Aubin,[1] who reported that he had been robbed by a man carrying a sawed-off shotgun and that he had dropped off this person in the vicinity of Rhode Island College[2] (A. 64-66). A police cruiser responded and Mr. Aubin was asked to follow the car to the Providence police station (A. 66). While Mr. Aubin was in the Providence police station waiting to give his statement, he happened to observe his assailant's, the respondent's, picture on a bulletin board (A. 66-67). He told this to a police officer. After giving his statement, Mr. Aubin picked the same individual's photograph out of a group of six photographs (A. 67-68). Shortly thereafter, the Providence police began a search of the Mount Pleasant area (A. 12, 42).

At approximately 4:30 A.M. on January 17, 1975, Patrolman Lovell apprehended the respondent, placed him under arrest, searched for weapons, and advised him of his *Miranda* rights (A. 12-14, 17-18, 27). Within minutes, Sergeant Sears arrived at the scene and again advised Innis of his constitutional rights under *Miranda* (A. 19, 28-29). Immediately thereafter, Captain Leyden arrived and also advised Innis of his *Miranda* rights (A. 20-21, 34-36). In response to the captain's warnings, the respondent stated that he understood these rights and that he wanted an attorney (A. 35). The captain then directed three officers, Patrolmen Gleckman, McKenna, and Williams, to place the respondent in the rear of a caged four-door sedan and transport him to the Central Station (A. 35). They were also instructed by the captain not to question Innis or to in-

[1] This testimony was elicited during a *voir dire* examination of Mr. Aubin. This *voir dire* was conducted after the trial judge had ruled on the admissibility of the shotgun. The trial court refused to allow the introduction of this testimony, concluding it was prejudicial "other crimes" evidence (A. 69).

[2] Rhode Island College is located in an area of Providence commonly referred to as Mount Pleasant.

timidate or coerce him in any way (A. 46). Two of the officers sat in front; one sat in the back with Innis (A. 43, 50, 58).

While en route to the Central Station, Patrolman Gleckman, who had been on the force for only two years, began a conversation with Patrolman McKenna (A. 41, 43-44). The respondent could hear this conversation (A. 46). Patrolman Gleckman stated:

> "A At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.
>
> "Q Who were you talking to?
>
> "A Patrolman McKenna.
>
> "Q Did you say anything to the suspect Innis?
>
> "A No, I didn't.
>
> "Q Did he say anything to you prior to this?
>
> "A At this point he stated 'stop'.
>
> "Q No. My question, prior to your saying that, had the defendant said anything?
>
> "A No.
>
> "Q Had anybody said anything to him?
>
> "A No.
>
> "Q And you were talking to Patrolman McKenna?
>
> "A Right.
>
> "Q And what happened next?
>
> "A At that point, as I was saying, there is kids running around there, as it is a handicapped school, and he says, you know, back and forth with Patrolman McKenna, he at this point said: 'Stop, turn around, I'll show you where it is.' At this point, Patrolman McKenna got on the mike and told the captain: 'We're returning to the scene of the crime, or where the weapon might be, and the subject is going to show us where it will be.'" (A. 43-44).

Patrolman McKenna radioed Captain Leyden and informed him that they were returning to the scene of the arrest to locate the weapon (A. 44, 50, 59). The car had traveled less than a mile at the time of this statement and they returned to the arrest scene at Obadiah Brown Road within minutes of leaving (A. 22-23, 38).

The other two officers corroborated this sequence of events and the general scope of their "conversation," disagreeing only on the question of where each officer was seated in the car (A. 43, 46, 49-50, 52-53, 58-59). All three testified that no one spoke to or with Innis (A. 44, 46, 53-54, 58-59).

Upon returning to the scene, Innis alighted from the car and Captain Leyden again advised him of his *Miranda* rights (A. 36, 38-39). Innis replied that he understood those rights but wanted to show them where the gun was because of the school that was in the area and the "small kids around" (A. 36, 39). He was placed back in the car and they all proceeded to a nearby field (A. 39-40). The respondent at first had trouble finding the weapon, finally locating it under some rocks along the side of Obadiah Brown Road (A. 14-15, 23-24, 30).

The respondent elected not to testify at the *voir dire* and did not dispute these facts either at the trial or on appeal (A. 61). The trial judge found that the respondent had been "repeatedly and completely advised of his Miranda rights," and that his offer to locate the gun constituted a waiver (A. 62-63). The respondent's motion to suppress the gun was denied (A. 63).

The trial proceeded and exhibit 41, the gun, was identified by one witness as having been in Innis' possession on the morning of January 13, 1975 (A. 68). Other witnesses had

previously testified that they had seen Innis on the night of January 12 with a shotgun. Patrolman Lovell identified exhibit 41 as the shotgun he found on Obadiah Brown Road pursuant to the respondent's direction (A. 70). Patrolman Gleckman testified in relevant part that Innis said, "Turn around, I'll show you where the weapon is," that upon their return Captain Leyden again administered "his rights," to which Innis responded that he understood and would show the police where the gun was, and that he did in fact direct the police to its location (A. 71-73). The respondent was found guilty by the jury of murder, kidnapping, and robbery. The respondent then appealed to the Supreme Court of Rhode Island.

On appeal the Supreme Court, with two of the five justices dissenting (Pet. App. 18a-29a), concluded that the shotgun and admissions should have been excluded from evidence and reversed the conviction. Seven issues had been raised on appeal but the ruling was based solely upon two of those issues (Pet. App. 2a).[3] The majority found that the respondent had exercised his *Miranda* right to counsel and that Patrolman Gleckman's statement constituted interrogation without a valid waiver from Innis of his *Miranda* rights. The court also concluded that, irrespective of the fourth set of warnings given by Captain Leyden, the seizure of the gun was the product of the improper remarks of Patrolman Gleckman and should have been suppressed as "fruit of the poisonous tree." *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978) (Pet. App. 1a-29a).

[3]The State Supreme Court also ruled that a defendant may not be convicted of both murder in the first degree under a felony murder theory and the underlying felony. The State did not seek review of this holding.

Summary of Argument.

This case involves the admissibility of statements made by the respondent after overhearing a conversation between two police officers, while he was lawfully in custody but subsequent to his having been advised of his rights as prescribed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and requesting counsel. It further involves the admissibility of physical evidence which was located by the police under the respondent's direction, subsequent to his statements but after he had once more been advised of his rights under *Miranda* v. *Arizona*, *supra*, and had orally acknowledged that he understood. The lower court held that the statement must be excluded because the respondent had been interrogated within the meaning of that concept as it had been expanded by the decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), in the absence of an affirmative waiver of his *Miranda* rights. The court then went on to hold that the respondent's subsequent offer of assistance and the physical evidence which he located for the police were the "fruit" of unlawful interrogation and should also have been suppressed at trial.

This case raises three analytically distinct but interrelated issues: the first concerns the precise meaning of interrogation which triggers the applicability of *Miranda* v. *Arizona*, *supra*; the second issue, in connection with which it is assumed the respondent was improperly interrogated, concerns the existence of a subsequent valid waiver of *Miranda* rights; and the third issue, in connection with which it is assumed the respondent was improperly interrogated and did not execute a valid waiver, is whether such a violation (transgression) must result not only in a per se exclusion of the initial statement but of the fruits as well.

I. The dominant issue in this case concerns the linchpin of *Miranda*, *supra*, custodial interrogation. There is no question

that the respondent was in custody. The only issue concerned whether he was interrogated after invoking his *Miranda* rights. Under *Miranda*, there is no interrogation where law enforcement officers do not by word or action compel incriminating responses from an individual in custody. When the facts of this case are analyzed under the Fifth Amendment concept of interrogation and not under the Sixth Amendment concept of definition as set forth in *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Brewer* v. *Williams*, 430 U.S. 387 (1977), it is abundantly clear that the respondent was not compelled to incriminate himself. Indeed, accepting for the purpose of argument only the broadest definition of the term interrogation devised by lower courts in cases involving the Fifth Amendment, the police conduct in the case at bar was neither intended nor likely to elicit incriminating responses from this respondent. Therefore, his admissions were not the result of interrogation.

II. Even if the State is wrong in concluding there was no interrogation, it does not necessarily follow that the respondent could not thereafter have validly waived his *Miranda* rights. In view of the nonegregious conduct involved, there was sufficient attenuation to dissipate any taint generated by the initial illegal activity.

III. Even if the State is wrong in its analysis of the interrogation and waiver, it does not follow that the *Miranda* exclusionary rule is absolute and all-pervasive. Such a result conflicts with the decisions of this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

In general, the Court has permitted use of illegally obtained evidence for certain purposes. *United States* v. *Calandra*, 414 U.S. 338 (1974).

The State submits that this Court has adopted a flexible approach in determining the extent to which judicial sanctions

will be imposed and that this approach requires examination of the nature of the violation, and the collateral purpose for which the "illegally" obtained statement is to be used. In the instant case, the statement resulted in the location of the shotgun. Since the statement here was not elicited through coercive police methods which would render it involuntary and unreliable, to prohibit its use to obtain real evidence, which is reliable in itself, would not further the public interest in having guilt or innocence determined on the basis of trustworthy evidence. Where there is no evidence of flagrant or intentional bad faith action on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real evidence.

Furthermore, the Fourth Amendment exclusionary rule which requires suppression of fruits of a direct constitutional violation (e.g., *Wong Sun* v. *United States*, 371 U.S. 471 [1963]) is inapplicable. The violation in the instant case is of *Miranda* prophylactic procedural rules only. Moreover, even if *Wong Sun* is applicable, its applicability should be limited to those situations in which police conduct rendered the statement involuntary. The *Miranda* violation is but one factor to be considered in addition to other relevant factors described in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

Argument.

I. There is No Violation of the Fifth Amendment Privilege Against Compelled Self-Incrimination nor of Miranda v. Arizona, Where There is No Interrogation.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court addressed the admissibility of oral and written statements obtained from defendants who had been subjected to custodial interrogation. The Court noted the key features present in the cases:

> "[I]ncommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.* at 445.

The Court ruled that whenever an individual is thrust into this situation he is entitled to certain procedural safeguards which must be employed to protect the individual's Fifth Amendment privilege against compelled self-incrimination. Thus, prior to any questioning, a defendant must be informed:

> "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479.

The Court deemed these requirements to be "fundamental with respect to the Fifth Amendment privilege" and a prerequisite "to the admissibility of any statement made by a defendant." *Id.* at 476.

The factual premise for the majority's holding was a finding that custodial interrogation by law enforcement authorities is inherently coercive. Without the enumerated warning and waiver requirements, an individual's decision to speak could not be considered free or voluntary.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

However, the Court made it clear that the "fundamental import of the privilege" is not whether an individual in custody may talk to the police with or without the benefits of warnings and counsel, but whether he may be *interrogated*. *Id.* at 478.

The Court in subsequent decisions has further described the circumstances which trigger the *Miranda* "protective devices," but only from the perspective of the coercion or compulsion generated by the custodial aspects of the situation. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968). See generally *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247 (1973). Most recently, in *Oregon* v. *Mathiason*, *supra*, and *Beckwith* v. *United States*, *supra*, the Court refused to extend the meaning of the word "custody" as it was used in *Miranda*, *supra*. In the former case this Court held that a statement by a parolee who had come to the police station at a police officer's request, who was told falsely that his fingerprints had been found at the

scene of the crime, and who was "interviewed" for one-half hour, during which time he confessed, was not the result of custodial interrogation. Since his personal freedom had not been restricted, he was simply not in custody.

> "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" 429 U.S. at 495.

While the Court has not directly addressed any circumstances where the existence or non-existence of interrogation was in issue, it certainly has not expanded the meaning of the word as it was employed in *Miranda* v. *Arizona, supra*. Nor, in view of its treatment of the issue of custody, has it even indicated that it has such an inclination.[4] It is the State's position that the decision of the Supreme Court of Rhode Island was patently erroneous concluding that *Brewer* v. *Williams*, 430 U.S. 387 (1977), had redefined and expanded the meaning of custodial interrogation to include a terse conversation between police officers which was neither intended nor likely to compel incriminating responses from the respondent. Every situation involving verbal or even nonverbal police conduct is not "converted to one in which *Miranda* applies" simply because a defendant is in custody. The State submits that the lower court failed to recognize the difference between interrogation under the Fifth Amendment and interrogation under the Sixth Amendment. Consequently, its conclusion that the

[4]See generally, Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99.

events which took place in the case at bar violated *Miranda* v. *Arizona, supra*, rests upon a factually and legally defective analysis.

A. *Interrogation which Results in a Violation of the Sixth Amendment Right to the Assistance of Counsel does Not Necessarily Violate the Fifth Amendment Privilege Against Self-Incrimination.*

In *Brewer* v. *Williams*, the Court specifically rested its decision on the Sixth Amendment right to the assistance of counsel. After concluding that the fact pattern in *Brewer* was constitutionally indistinguishable from that presented in *Massiah* v. *United States*, 377 U.S. 201 (1964), the Court reiterated that:

> ". . . the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." 430 U.S. at 401.

It is clear, however, from a reading of *Massiah* v. *United States, supra*, that the term interrogation as employed in that case has a much broader and a very different meaning than it was subsequently given in *Miranda*. The State suggests that, once a defendant's Sixth Amendment right to counsel attaches, the existence or non-existence of interrogation as the word is normally used becomes or should become "constitutionally irrelevant."[5] An analysis of *Miranda* and *Massiah* makes this proposition abundantly clear.

[5]See generally, Kamisar, Y., *Brewer* v. *Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 4 (1978).

In *Miranda*, the Court was concerned with protecting a suspect or an accused from being compelled to incriminate himself in ignorance of his Fifth Amendment rights. Thus the Court decided that a waiver of that right would only be recognized after *Miranda* warnings are given. However, *Miranda* rests upon two footings, custody and interrogation by law enforcement authorities. Without that combination of factors and without the interplay between the two, there is no infringement of the privilege against compelled self-incrimination.[8]

The Court in *Miranda* noted that, in each of the four cases before it,

> "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.
>
> . . . . . .
>
> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation." *Id.* at 457.

The danger to be guarded against was psychological as well as physical coercion exerted by law enforcement authorities over a person in their control. Each of the cases reviewed in *Miranda* involved extensive questioning by police officers at the police station of a person who was well aware of the forces which were being and could be brought to bear upon him.

The defendant's position in *Massiah* was at the opposite end of the spectrum when compared to the positions of the defend-

[8] *Id.* at 63, 64.

ants in *Miranda* and the companion cases. Massiah was at liberty and had no idea he was being interrogated. The defendant Massiah had been indicted, retained counsel, pleaded not guilty and was released on bail. A few days later Colson, a co-defendant, agreed to act as a government agent. He subsequently engaged the defendant in a conversation in the privacy of Colson's car. Unbeknown to Massiah, the entire conversation was overheard by federal agent Murphy. During this conversation Massiah made several incriminating remarks which were repeated by Murphy at the defendant's trial. The Court held that the defendant had been denied the basic protections guaranteed by the Sixth Amendment when:

> "there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

The Court saw no distinction between the situation illustrated by *Spano* v. *New York*, 360 U.S. 315 (1959), where the defendant, after indictment, was interrogated in a police station, and the situation present in *Massiah* where the defendant had no idea he was "under interrogation by a government agent." *Id.*

As Justices White, Clark and Harlan noted in the dissent, the record in *Massiah* was devoid of any indicia of compulsion, and consequently the "Court's newly fashioned exclusionary principle [went] far beyond the constitutional privilege against self-incrimination." *Id.* at 209.

> "At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. . . . There was no suggestion or any possibility of coercion." *Id.* at 211.

It is clear that Massiah had no idea the government was attempting to elicit incriminating information. His conversation with the co-defendant was friendly and took place in the privacy of Colson's car. There was absolutely no compulsion to speak. As Mr. Justice White noted in his dissent,

> "Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial. . .." *Id.* at 211 (White, J., dissenting).

Thus, it is clear from both the majority and the dissenting opinions that the *Massiah* doctrine applies regardless of the defendant's awareness that he is being interrogated. *Massiah* prohibits the government or anyone acting on behalf of the government from deliberately eliciting or inducing incriminating statements from a defendant once adversary judicial proceedings have commenced.[7] It is irrelevant whether he is in custody, and whether he is even aware that the government is interrogating him. *Massiah* clearly stands for the proposition that, once adversary proceedings have commenced against an individual, he is entitled to the assistance of counsel, regardless and independent of any government interrogation.[8] The commencement of adversary proceedings, not custodial interrogation, is the linchpin of the *Massiah* rule.

This interpretation is further supported by the Court's summary treatment of *McLeod* v. *Ohio*, 381 U.S. 356 (1965). In that case a defendant had made incriminating statements while aiding the police in locating evidence of the crime. He

[7] *Id.* at 63.

[8] *Id.* at 33.

had been indicted but neither requested nor was represented by counsel. The Ohio Court of Appeals had found no evidence of coercion, threats, or promises. This Court found *Massiah* dispositive. See also *Beatty* v. *United States*, 389 U.S. 45 (1967) (rev'd per curiam, citing *Massiah* v. *United States*, *supra*.)

The Court's decision in *Hoffa* v. *United States*, 385 U.S. 293 (1966), further illustrated the distinction between *Massiah* and *Miranda*. In *Hoffa*, Partin, a government informer, was privy to the private discussions of the defendant while he was on trial for violations of the Taft-Hartley Act. Partin's reports to federal agent Sheridan during the Test Fleet trial and his subsequent testimony during the defendant's trial for jury tampering unquestionably contributed to his conviction. The Court, in rejecting Hoffa's argument under the Fifth Amendment, noted that *Miranda* was predicated upon the inherently compelling pressures generated by custodial interrogation:

> "In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case." *Id.* at 304.

The Fifth Amendment does not protect one from confessing, only from being compelled to confess. Compare also *Osborn* v. *United States*, 385 U.S. 323 (1966); *United States* v. *White*, 401 U.S. 745 (1971).

The Supreme Court of Rhode Island stated explicitly that one of the issues on appeal was "whether defendant [had been]

'interrogated' within the meaning of *Miranda* . . ." (Pet. App. 4a). However, for the court to assume that the law and facts of *Brewer* were dispositive of the *Miranda* question was erroneous.

In *Brewer*, the Court stressed three key factors which rendered the case amenable to a *Massiah* analysis: judicial proceedings had been initiated against Williams prior to the drive to Des Moines, that is, a warrant had been issued for his arrest, he had been arraigned, and committed by the court to confinement; Detective Leaming "deliberately and designedly" set out to elicit incriminating responses from Williams knowing full well that Williams was represented by counsel, had consulted with counsel, and had been instructed not to say anything and that Leaming had been instructed and had agreed not to question the defendant; and Detective Leaming deliberately isolated Williams from counsel. 430 U.S. at 399, 400. The Court decided, and indeed the State of Iowa conceded, that Leaming's "Christian burial speech" was tantamount to the type of governmental interrogation which violates the Sixth Amendment guarantee of the assistance of counsel as enunciated in *Massiah*. *Id.* at 399-401.

Whether this was the type of "interrogation" which would have compelled incriminating responses in violation of the Fifth Amendment privilege was neither discussed nor relevant to the disposition of *Brewer*. What this Court might have concluded had the Fifth Amendment's applicability been discussed rests in the realm of conjecture. However, one thing is certain: whatever the atmosphere, whatever the type of questioning, Detective Leaming admittedly sought to elicit or induce incriminating responses from Williams after the commencement of adversary proceedings, and this fact flies directly in the face of the decision in *Massiah* v. *United States*, *supra*.

The record in the case at bar is devoid of any of the elements this Court found controlling in *Brewer*. The Rhode Island Supreme Court erred in analyzing the facts of the case before it in terms of *Brewer*. The decisions in *Brewer* and *Massiah* are grounded on the Sixth Amendment right to the assistance of counsel and the Sixth Amendment had no applicability to the respondent's case because adversary proceedings had not been instituted against him at the time of the patrol car ride. The admissibility of the shotgun should have been determined by deciding whether Innis had been forced to incriminate himself in violation of the Fifth Amendment.

B. *There is No Interrogation in Violation of the Fifth Amendment Where Police Conduct is Neither Intended Nor Likely to Compel Incriminating Responses from a Suspect who is in Custody.*

The Supreme Court of Rhode Island should have employed a Fifth Amendment analysis when it considered whether the respondent had been interrogated. Under such an analysis only one thing is relevant — custodial interrogation. Admittedly, this respondent was in custody. However, the State submits that Officer Gleckman's remark concerning the location of a nearby school was neither intended nor likely to compel incriminating responses from Innis and therefore was not interrogation.

The events which took place in the patrol car in which the respondent Innis was riding cannot be categorized as interrogation which amounts to a violation of the privilege against self-incrimination when measured against *Miranda*. The linchpin of the *Miranda* decision was the inherent coercive nature of incommunicado custodial interrogation by the government. In *Miranda*, the defendant was arrested and was interrogated in an interrogation room by two police officers for

two hours. In the companion case of *Vignera* v. *New York*, the defendant was arrested and questioned by one detective, then removed to another station and questioned again by an assistant district attorney. In the second companion case of *Westover* v. *United States*, the defendant was arrested, interrogated on the night of his arrest and the following morning, and turned over to the FBI which continued the interrogation for two and one-half hours until he finally confessed. Finally, in the third companion case, *California* v. *Stewart*, the defendant was arrested, removed to the police station and interrogated on nine separate occasions over the course of five days until he confessed. All of these cases involved extensive and repeated *questioning* by police officers in the police station *until* confessions or admissions were obtained. The records did not adequately demonstrate in any of the cases that the defendants had been informed of or were aware of their constitutional rights.

Some aspects of "*Miranda* interrogation" which the Court had addressed in previous decisions are highlighted incidentally in the discussion in *Brewer* v. *Williams*. It is clear: that interrogation need not be in the form of a question; that interrogation may involve the use of psychological ploys as well as the more obvious direct question; and that the police must intend to produce incriminating responses. However, there is certainly nothing expansionistic or innovative about these observations. See *Miranda* v. *Arizona*, *supra*; *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, *supra*. Isolating those elements of *Brewer* v. *Williams*, *supra*, which are relevant to a discussion of interrogation under the Fifth Amendment principles of *Miranda*, the following salient features become noticeable: the police knew of and made use of the defendant's mental inbalance and "quixotic religious convictions," 430 U.S. at 412 (Powell, J., concurring); the police intended to isolate Williams

from his attorney in order to obtain all the information they could before reaching Des Moines (*id.* at 399); the defendant was alone in the car for three to four hours with two police officers (*id.* at 408) (Marshall, J., concurring); Detective Leaming informed Williams prior to leaving, despite William's protestations to the contrary, that they would be visiting (*id.* at 391, 392); Detective Leaming knew the girl was dead[9]; Detective Leaming also knew that the location of the body would eventually be revealed (*id.* at 408) (Marshall, J., concurring); Leaming was an experienced interrogator as evidenced by the many classic techniques employed in delivering the Christian burial speech (*id.* at 412) (Powell, J., concurring)[10]; and Williams felt threatened, with or without cause, by the police.[11] This record reveals that Detective Leaming intentionally created an environment and employed classic interrogation skills to which Williams was likely to respond for no other purpose than to elicit incriminating responses from the suspect.

The State submits that the facts presented in the case at bar do not even approach in constitutional infirmity those which were presented in *Miranda* and the companion cases or in *Brewer*. While the defendant was in custody, it was neither incommunicado, nor was he threatened or intimidated. Innis had been in custody only a matter of minutes. Officer Lovell testified that as he drove along Chalkstone Avenue, the respondent Innis was "standing on the street," facing the car (A. 16). When the patrolman stopped the car, respondent continued to stand there, and then walked towards the car. There was no fight (A. 16-17). As they waited for the others to

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[9] *Id.* at 9, 10 (quoting from Joint App. 92-93, 96-97, 108-109).

[10] Kamisar, *Foreword: Brewer* v. *Williams — A Hard Look at a Discomfiting Record*, 66 Geo. L.J. 209, 211, 215-233 (1977).

[11] *Id.* at 220, n. 49 (quoting from Joint App. at 79-80, 94-95, 96).

arrive, the respondent requested and was given a cigarette (A. 18). The respondent was immediately informed of his rights by each officer (A. 13, 14, 27, 29, 33, 35). The captain immediately complied with his request for an attorney by arranging for his immediate return to the station (A. 35). Unlike the situation in *Brewer*, there was nothing in the captain's response to Innis and his instructions to the patrolmen to indicate that Innis' choice would not be "scrupulously honored." As the Court noted in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), when law enforcement authorities respect a suspect's exercise of his *Miranda* rights, that fact "counteracts the coercive pressures of the custodial setting." *Id.* at 104. Thus, in view of the initial police response to Innis, and his own demeanor, it is clear that any coercive pressures generated by the arrest were at best significantly reduced or at worst merely those generated by any arrest.

The situation in the caged wagon is also completely different from that present in *Miranda* and *Brewer*. The defendant was not seated for hours next to an experienced senior officer. He was seated for a matter of minutes next to a patrolman who had been given explicit instructions not to question, intimidate or coerce him in anyway (A. 22-23, 38). No questions or remarks were directed towards Innis (A. 44, 46, 53-54, 58-59). While this situation is admittedly "custodial" under *Miranda*, it is certainly not of the type or nature which this Court found inherently coercive in *Miranda*. Nor is it the type of fear-generating custodial situation in which *Brewer* was held for hours.

The remarks in question were neither intentional nor likely to evoke a response. Only a cynic could conclude that Gleckman, a patrolman with less than two years on the force, planned and executed the "ploy" during the three to five minutes between the time he was assigned to the wagon by Captain Leyden and the point when Innis volunteered to

locate the shotgun. There is no language in the remarks which would lead one to conclude that they were aimed at Innis. There were no insults, no conjectures about Innis' responsibility should an accident occur. As the trial judge noted, it was "entirely understandable" that these officers would have voiced their concerns to one another (A. 63). Furthermore, to conclude that Gleckman really expected that Innis, who was accused of robbing a cab driver with a sawed-off shotgun, would respond to the plight of hypothetical small children is fairly unreasonable. There is no evidence, as was present in *Brewer*, that Innis in fact was known to have a concern for children (A. 62-63).

The State submits that where a defendant is informed of his rights, is not held incommunicado, is neither threatened nor thrust into a coercive environment beyond that inherent in an arrest, and overhears a conversation which is neither intended nor likely to elicit an incriminating response from him, then there is no interrogation.[12]

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[12] Even those lower courts which have addressed the question of what constitutes interrogation and which have imposed a strict definition have stressed the existence of intent on the part of the police and/or the compelling nature of the question, statement or nonverbal conduct. In *United States* v. *McCain*, 556 F. 2d 253 (5th Cir. 1977), prior to advising a suspected drug smuggler who was in custody of her *Miranda* rights, a customs inspector "informed" her of the serious danger posed by carrying drugs internally, thus prompting her admission. The court found that the inspector deliberately and designedly set out to elicit incriminating admissions and that this amounted to interrogation. The court in *Combs* v. *Wingo*, 465 F. 2d 96 (6th Cir. 1972), found that immediately confronting a defendant who had requested counsel with a ballistics report amounted to interrogation since the "only possible object of showing the . . . report . . . was to break him down and elicit a confession from him." *Id.* at 99. In *Commonwealth* v. *Mercier*, 451 Pa. 211, 302 A. 2d 337 (1973), despite a defendant's refusal to answer questions until counsel arrived, the police immediately confronted him with a co-defendant's statement implicating him. The court considered this "interrogation" since it was intended or likely to elicit a confession. Compare,

In the case at bar the record is barren of any indication that Innis was abused, threatened, coerced or tricked into revealing the location of the gun. After he directed the officers to turn the car around nothing more was said. Upon their return to the scene, Innis stepped out of the car and was again advised of his *Miranda* rights by Captain Leyden. Innis expressly acknowledged that he understood these rights but nevertheless wished to retrieve the gun. The State Supreme Court's conclusion that Innis had been interrogated logically requires that police "assume the role of contemplative monks" or that suspects be transported and confined in sterile atmospheres free from any and all oral and visual stimuli which might cause them to reconsider a previous assertion of *Miranda* rights (Pet. App. 18a-19a). Such a result extends the term "interrogation" to the point of absurdity. The decision in *Miranda* made it clear that:

> "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478.

The State submits that the admission made in the case at bar was not the product of interrogation since it was not compelled. The respondent, however motivated, freely and voluntarily elected to disclose the location of the weapon.

Haire v. *Sarver*, 306 F. Supp. 1195 (E.D. Ark. 1969), aff'd, *Haire* v. *Sarver*, 437 F. 2d 1262 (8th Cir. 1971), where the court found that a defendant, who had been in custody for several hours, was not interrogated when he responded to questions which the police had directed to his wife in his presence.

> "Defendant at no time was asked a single question and at the time he made the voluntary statements both he and his wife apparently were cooperative with the officers. There is no background or atmosphere here in any wise comparable to the four cases in *Miranda*." 437 F. 2d at 1264.

II. The Respondent Knowingly and Voluntarily Waived his Rights under Miranda After the Fourth Set of Miranda Warnings had been Given.

Assuming, *arguendo*, that the respondent was interrogated in violation of *Miranda* v. *Arizona*, *supra*, the Rhode Island Supreme Court's perfunctory conclusion that the respondent's subsequent waiver in response to the fourth warning was inadmissible "fruit of the poisonous tree" was clearly erroneous. The State submits that there was a sufficient amount of attenuation between the "interrogation" in the car and the respondent's decision to lead the police to the gun to make that decision a valid waiver of Innis' *Miranda* rights.

Innis had not been intimidated, coerced or threatened. His request for counsel had been scrupulously honored except for the one conversation. Upon his return to the scene, Innis was removed from the car (A. 36). He was removed from the control of his "interrogators" to a different environment and placed under the direct control of Captain Leyden. This officer, who had previously complied with Innis' requests, once more read him his *Miranda* rights and asked specifically if Innis understood. The respondent replied affirmatively, indicating that he wanted to get the gun out of the way because of the small children in the area (A. 36, 39).

It is clear that the police officers were not "exploiting" previous illegal action. Unlike the situation in *Brewer*, the respondent was removed from the control of his "inquisitors" and reminded of his rights and the consequences of his action. In *Brewer* the defendant was subjected to the ever-increasing pressures generated by Detective Leaming's presence and statement and the long car ride ahead. Leaming never pref-

aced his speech with renewed *Miranda* warnings. Furthermore, Williams had repeatedly stated that he did not want to talk.

The Court in *Brewer* reiterated that the Sixth Amendment right to the assistance of counsel may be waived "without notice to or consultation with counsel." 430 U.S. at 413 (Powell, J., concurring). In *Brewer*, the facts demonstrated "comprehension" but did not demonstrate "relinquishment." *Id.* at 404. The record "provide[d] no reasonable basis for finding that Williams waived his right to the assistance of counsel." *Id.* at 405. The State submits that the record in the case at bar affirmatively demonstrated an intentional waiver of rights. See *North Carolina* v. *Butler*, ____ U.S. ____, 25 Cr. L. 3035 (1979).

The State further submits the Rhode Island Supreme Court erred in finding *Wong Sun* dispositive of the waiver argument. This Court has never applied the *Wong Sun* doctrine to *Miranda* violations. Indeed, in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the Court noted that the *Miranda* warning is a "prophylactic rule" and a "procedural safeguard" and that the exclusionary rule under the Fourth Amendment "serves interests and policies that are distinct from those it serves under the Fifth." *Id.* at 600, 601.[13]

The State submits that no valid purpose of the exclusionary rule as enunciated in *Wong Sun* would be served by excluding the respondent's second admission which led to the discovery of the shotgun.

[13] This issue is addressed in part III D of the petitioner's brief.

III. Physical Evidence Located and Seized as a Result of a Statement Obtained in Violation of Miranda v. Arizona is Not Per Se Inadmissible.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court deemed it necessary to construct an absolute rule mandating the exclusion of statements obtained in the absence of certain warnings because of the apparent practical difficulties in determining whether, in any given case, the self-incrimination clause has been violated.

The Court acknowledged that in reviewing confessions obtained in an incommunicado police-dominated atmosphere, "we might not find the defendants' statements to have been involuntary in traditional terms." *Id.* at 457. Nevertheless, the Court instituted a presumption of involuntariness where the suspect makes a statement without first having been fully advised of his right to counsel and his right to remain silent. The critical concern of the Court was the dangers inherent in "incommunicado" interrogation. *Id.* at 445. Upon exhaustive analysis of commonly employed investigatory techniques, it found that, despite all official efforts at reform, sophisticated police practices, primarily psychological in nature, were still being employed to extract confessions. *Id.* at 445-454.

However, the decision in *Miranda* v. *Arizona* was limited to the admissibility of statements which are obtained from an individual subjected to custodial police interrogation in the prosecution's case in chief. *Id.* at 445. The Court did not address itself directly to the admissibility of real evidence located as a result of statements obtained in violation of the *Miranda* safeguards, nor to what collateral use, if any, could be made of these statements.[14]

[14] It is true that the *Miranda* majority stated: "unless and until . . . warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]" (384

The Supreme Court of Rhode Island has read *Miranda* to require the *per se* exclusion of not only the impermissibly obtained statements themselves but of all evidence derived from those statements as well. The court below concluded, with very little discussion, that:

> ". . . to allow the shotgun to be admitted into evidence would be to allow the state to benefit from the illegal actions which occurred in the police wagon. The seizure of the weapon was the product of the improper remarks of Officer Gleckman. Because of this inescapable fact, the weapon and any evidence leading to its discovery must be suppressed as 'fruit of the poisonous tree.' We have no doubt that the discovery of the shotgun occurred as a result of an 'exploitation' of the original illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963)." *State* v. *Innis*, 391 A. 2d 1158, 1164 (1978) (Pet. App. 11a).

U.S. at 479). Two of the dissenters evidently feared the application of the "fruit of the poisonous tree" doctrine to *Miranda* violations. See 384 U.S. at 500 (Clark, J.); cf. 384 U.S. at 545 (White, J.). However, even if the quoted phrase in the majority opinion was intended to refer to derivative evidence, the statement must be considered dictum, since none of the *Miranda* cases involved the use of "fruits" of unlawfully obtained statements.

There has, moreover, been doubt among legal scholars that the Court could have intended in one casual sentence to dispose of the complex question of the scope of the exclusionary rule devised in the *Miranda* decision. Judge Friendly reads "evidence obtained as a result" to mean the statements made during an unlawful interrogation, rather than evidence derived from leads developed during a period of improper questioning. Friendly, *Benchmarks* (U. Chi. Press 1967), at 279. See also Edwards, *Interrogation of Criminal Defendants — Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 169, 193 (1966).

Finally, the issue was raised in *Orozco* v. *Texas*, 394 U.S. 324 (1969), but was not reached.

Assuming, *arguendo*, that the respondent's statements in the car and to Captain Leyden should have been suppressed,[15] this broad interpretation of the judicial sanctions imposed by *Miranda* is inconsistent with the rulings of this Court which have permitted the collateral use of such statements at trial and have permitted the introduction at trial of evidence derived from such statements while not permitting the use of the statements themselves in the case in chief. Here the evidence which the State sought to introduce, the shotgun, was located by the respondent after the police had inadvertently made him aware of the location of a nearby school and after reminding him of his *Miranda* rights.

In *Harris* v. *New York*, 401 U.S. 222 (1971), this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated:

> "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

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[15] The State is assuming for the purpose of this argument that all testimony concerning what the respondent said and did would be excluded. The State would argue that its admission was harmless error. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

The Court noted that there was no suggestion "that the statements made to police were coerced or involuntary." *Id.* Under these circumstances, the Court then balanced the deterrent effect of exclusion against society's interest in a full and fair hearing, stating:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the defendant had been given incomplete *Miranda* warnings; his statements led police to a third-party witness who testified at trial. The Court held that use of this testimony was not a forbidden derivative use of the defendant's initial statements, and, in so doing, explicitly distinguished between a *Miranda* violation and a violation of the constitutional privilege against self-incrimination. *Id.* at 444. The Court, noting that the interrogation involved "no compulsion sufficient to breach the right against self-incrimination" (*id.* at 445), held that the interests of justice in a full hearing on the basis of all trustworthy evidence outweighed the value of a deterrent effect, if any, in the exclusion of such evidence.

This Court has repeatedly rejected a *per se* application of the exclusionary rule. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that evidence seized in violation of the Fourth Amendment, though inadmissible at trial, could be

used in grand jury proceedings. Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, 435 U.S. 268 (1978). In general, the Court has declared:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a *per se*, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not mandated as a matter of federal constitutional law.[16]

Consistent with *Michigan* v. *Tucker*, *supra*, a determination to apply the exclusionary rule should take into account the nature of the violation, the nature of the evidence located as a re-

[16] The State does not contend that the fruits of illegally obtained statements should never be excluded. When the *Miranda* violation consists of deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of the exclusionary principle would appear warranted. See Friendly, *Benchmarks*, *supra*, at 260-261, 282. However, where, as here, the *Miranda* violation is merely a technical one and no actual constitutional violation is alleged or proved by the defendant, exclusion of the statements alone is sufficient to serve the purposes of deterring illegal conduct and ensuring the trustworthiness of evidence for which the *Miranda* exclusionary rule was fashioned.

sult of the violation and the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence.

A. *Nature of the Violation.*

In the instant case the record is devoid of any indicia of deliberate police misconduct. Innis received *Miranda* warnings from three different police officers in succession before he was placed in the police wagon (A. 17-18, 29, 35). While waiting for the other officers to arrive, Innis was seated in a police car. He requested and received a cigarette from Patrolman Lovell (A. 18). When Innis requested an attorney, Captain Leyden immediately complied with his request (A. 35). Innis was placed in the car with two patrolmen in front and one in back (A. 43).

The officers were instructed not to question, intimidate, or coerce him (A. 46), just transport him to the front office, that is, the business office at the Central Station (A. 46, 54). Within minutes of leaving the scene of the arrest one officer made a casual remark to another concerning the location of a school in the area and the likelihood of a child locating the gun before the police did[17] (A. 43-44, 52-53, 58). To this Innis spontaneously replied: "Stop, turn around, I'll show you where it is" (A. 44, 50, 58). After the wagon returned to the scene of the arrest, Innis was once more advised of his *Miranda* rights and afforded an opportunity to respond (A. 36, 38, 39). After his affirmative response, the group drove further up the road. Innis got out of the car and directed the search (A. 39-40). The respondent did not locate the weapon immediately (A. 14-15,

[17] There is no contention that this statement of fact was untrue (Pet. App. 25a, 27a).

23-24, 30). Thus, after his spontaneous remark, Innis had an opportunity to change his mind. There was no compulsion for Innis to follow through with his initial spontaneous offer of assistance.

The trial judge noted that he was impressed with the credibility of the officers who testified (A. 62). He further found that it was "entirely understandable" that three officers, out at four in the morning, who have reason to believe that a loaded weapon is in the area of a school for retarded and handicapped children, would voice their concern to each other (A. 62). There is nothing in the record which indicates any deliberate police misconduct, any trickery, or any dishonest purpose to coerce or intimidate the respondent. The single factor which the reviewing court found violative of *Miranda* was Gleckman's casual observation (Pet. App. 7a). The court concluded that, because of this interrogation, the respondent did not subsequently knowingly and intelligently waive his rights (Pet. App. 10a-11a).

The State submits that nothing in the record indicates or even hints at involuntariness in the Fifth Amendment sense. The trial judge found there were no threats and there was no coercion (A. 63). The Supreme Court merely termed the remarks "highly improper" (Pet. App. 9a). There is no indication that the atmosphere was any more coercive than that which arises from the necessary or routine process of taking an individual into custody. The situation was not one where the police were attempting to subjugate the defendant to their will. Thus, there is nothing in the record to indicate that the respondent was compelled in a Fifth Amendment sense to incriminate himself.

B. *Nature of the Derivative Evidence.*

As in *Michigan* v. *Tucker*, *supra*, the evidence obtained as a result of the respondent's statement is highly reliable. Real

evidence carries with it greater indica of trustworthiness than oral testimony. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring); see also *Stone* v. *Powell*, 428 U.S. 465, 497 (1976) (Burger, C.J., concurring). In the instant case there is absolutely no reason to doubt the reliability of the evidence, the shotgun, simply because the defendant became aware of the nearby location of a school after he had asserted his rights under *Miranda*.

Since there is nothing in the record which indicates involuntariness in the Fifth Amendment sense and the events surrounding the arrest and seizure are absolutely undisputed, there is no reason to exclude as a matter of law or policy such highly reliable evidence.

C. *The Consequences of Applying the Exclusionary Rule.*

Even where an exclusionary rule is otherwise justified, such a rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra, supra*, at 348. This determination necessarily involves a "balancing process" in which the likelihood of deterrence is weighed against the damage done to our system of justice by the exclusion of relevant evidence. *Id.*

It seems reasonably clear, based on empirical evidence, that the extension of the exclusionary rule to the fruits of a statement taken in violation of *Miranda's* prophylactic rules is not likely to undermine the deterrent effects of the exclusionary rule. If studies which have shown that the giving of *Miranda* warnings has had little effect on the decisions of most criminal defendants to speak[18] are correct, it is unlikely that law enforcement officers will risk losing the use of a full confession in the speculative hope of obtaining derivative evidence (which they will still have to connect to the defendant by evidence independent of his statement).

[18] Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519 (1967); Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L.J. 300 (1967); Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42 (1968).

Indeed, in the case at bar, the police did not question Innis further once he had made a request, even though they believed the shotgun, either loaded or with shells, was located in the general area. Furthermore, Captain Leyden confronted Innis again with his *Miranda* rights and asked if he understood (A. 36).

This respondent was read the *Miranda* warnings on four separate occasions. There was no extended interrogation, no incommunicado questioning by a battery of skilled interrogators. There was only a single conversation overheard by the respondent in the car. It is difficult, if not impossible, to articulate a positive deterrent rationale for excluding the shotgun from evidence. As this Court stated in *Michigan* v. *Tucker, supra*,

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 447.

Given only a speculative possibility that exclusion of the real evidence seized pursuant to an otherwise valid warrant would provide a positive deterrent effect on future police conduct,

the State suggests that the interests of the public and of justice in having a defendant's guilt or innocence determined on the basis of trustworthy evidence compels a result contrary to that reached by the Supreme Court of Rhode Island. *See Michigan* v. *Tucker*, *supra*. The lower court's automatic, *per se* application of the exclusionary rule is simply not compelled by federal standards and is inconsistent with this Court's efforts to balance the conflicting interests involved before applying the rule. Within the Fourth Amendment context this Court has recognized that the policies behind the exclusionary rule are not absolute. *See Stone* v. *Powell*, 428 U.S. 465 (1976).

> "I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer* v. *Williams*, 430 U.S. 387, 413-414, n.2 (1977) (Powell, J., concurring).

The State urges this Court to apply a similar flexible approach when applying the exclusionary rule to a case falling solely within the context of *Miranda* v. *Arizona*, where the police conduct involved is neither flagrant, coercive, nor deliberate. Any other approach offends the sense of justice

when a violent criminal goes free as the result of inadvertent and, indeed, almost trivial police error.

D. *The "Fruit of the Poisonous Tree" Doctrine does Not Require Exclusion of the Physical Evidence Found with the Respondent's Assistance.*

The court below held that the evidence obtained as a result of the respondent's assistance must be excluded under the "fruit of the poisonous tree" doctrine. The court concluded that the weapon and any evidence leading to its discovery must be suppressed as "fruit of the poisonous tree" under *Wong Sun* v. *United States*, 371 U.S. 471 (1963) (Pet. App. 11a).

The State submits that this Court, however, has never applied the *Wong Sun* doctrine to *Miranda* violations, although the Court has indicated that in a "proper" case the doctrine might have applicability. *Michigan* v. *Tucker*, *supra*, at 447. The State submits that the "proper" case, unlike the instant case, would be one involving coercion or bad faith conduct on the part of police officers.

The State further submits that the "fruit of the poisonous tree" doctrine does not apply unless the initial illegality is of constitutional dimension and, further, that the deterrent purpose of the exclusionary rule in general would not be furthered by such application.

Wong Sun prohibited use of evidence derived from an illegal arrest and search which violated Fourth Amendment rights. Thus, the "primary illegality" which triggered application of the prohibition against use of derivative evidence involved a constitutional violation.

However, in *Michigan* v. *Tucker*, the Court expressly rejected an equivalence between *Miranda* violations and constitutional violations. *Id.* at 444-445. The Court, although

finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Id.* at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific constitutional guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[19]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[20] *Simmons* v. *Clemente*, 552 F. 2d

[19] This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[20] The Ninth Circuit, in *United States* v. *Lemon*, 550 F. 2d 467, 472 (9th Cir. 1977), did not resolve the issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pre-trial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), cert. denied, 421 U.S. 970 (1975).

65 (2d Cir. 1977). See *Bartram* v. *State*, 33 Md. App. 115, 364 A. 2d 1119 (1976), and cases cited therein[21]; *Rhodes* v. *State*, 91 Nev. 17, 530 P. 2d 1199 (1975).[22]

The State submits that the only justification for an extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. In the instant case, no such finding of involuntariness has been made, nor would the facts support such a finding under the "totality of the circumstances" test. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court outlined the factors to be considered in determining voluntariness:

[21] In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

[22] In a pre-*Tucker* case, *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969), a federal district court indicated its view that the Fifth Amendment as construed by *Miranda* did not necessarily operate to exclude physical evidence discovered as a result of disclosures made in violation of *Miranda*. The court, while apparently of the view that *Miranda* requirements were of parallel, co-equal status with the Fifth Amendment, distinguished between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion, citing *Schmerber* v. *California*, 384 U.S. 757, 764 (1966):

> "Under *Schmerber* and *Killough* then the gun is not necessarily made inadmissible by the mere fact that Keister showed the officers its whereabouts having not been first given the requisite warning under *Miranda*. The Commonwealth will have to identify the gun other than by *statements* made by the accused while in custody as a result of police interrogation." 307 F. Supp. at 1176 (emphasis in opinion).

". . . the youth of the accused, *e.g.*, *Haley* v. *Ohio*, 332 U.S. 596; his lack of education, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560; or his low intelligence, *e.g.*, *Fikes* v. *Alabama*, 352 U.S 191; the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737; the length of detention, *e.g.*, *Chambers* v. *Florida*, *supra*; the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft* v. *Tennessee*, 322 U.S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433." 412 U.S. at 226.

See generally *Miranda* v. *Arizona*, *supra*, at 508 (Harlan, J., dissenting).

Assuming *arguendo* that there was an interrogation, the interrogation in the case at bar could not have lasted more than a minute (A. 21-22, 38). The respondent had been in custody a matter of minutes. There is no indication that he was treated abusively, intimidated or tricked. The record shows clearly that the police were striving to ensure that the respondent's rights were protected and there is no indication that Innis perceived the situation as otherwise. The transcript at sentencing reveals that the defendant has a long history of antisocial behavior (A. 75). Thus the situation he found himself in that night was not a new one.

The State suggests that the application of the exclusionary rule to require suppression of otherwise reliable and probative evidence discovered under circumstances free of coercive or bad faith conduct serves neither to effectuate the purpose of the exclusionary rule nor to best serve the interests of justice.

The primary purpose of the exclusionary rule is to deter police misconduct.

"'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, 414 U.S. 338, 347 (1974), quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In order to effectuate this purpose, logically some intentional bad faith conduct must be involved. *Oregon* v. *Hass*, 420 U.S. 714 (1975). No such showing had been made.

The real evidence under attack in the instant case, as opposed to compelled testimony, carries its own indicia of reliability. Therefore, the alternative justification for application of the exclusionary rule — to protect "the courts from reliance on untrustworthy evidence" (*Michigan* v. *Tucker*, at 448) — is also inapplicable.

The rationale of *Michigan* v. *Tucker* is applicable to the instant case. The court below has erred in attributing immutable, independent constitutional status to the *Miranda* safeguards in direct conflict with this Court's decisions. The Supreme Court of Rhode Island, the State respectfully submits, has read too broadly the exclusionary requirement of *Miranda* v. *Arizona* as requiring *per se* exclusion for all purposes of statements taken in violation of its prophylactic standards.

E. *The Introduction of the Testimony Concerning What the Respondent Said and Did was Harmless Error.*

The Rhode Island Supreme Court concluded that the introduction of the respondent's admissions and the shotgun into evidence was not harmless error beyond a reasonable doubt. Should this Court rule that the respondent's second admission and the shotgun, or, alternatively, the shotgun, were properly

introduced into evidence, then the State submits that the introduction of any other admission was harmless error beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Milton* v. *Wainwright*, 407 U.S. 371 (1972). The State introduced the following evidence:

On the evening of January 12, 1975, Mrs. Hall, of 107 Comstock Avenue, observed Innis saw off both the stock and barrel of a shotgun and leave her apartment with the weapon wrapped in a blue and white floral blanket. She identified the blanket at the trial (R. 161, 162, 164, 166).

A Mr. Hawkins, who also lived in the building knew Innis (R. 189, 190). He had previously observed a shotgun in Mrs. Hall's kitchen (R. 190, 191). On the night of January 12, 1975, Mr. Hawkins placed two calls to request a cab on Innis' behalf. At approximately 10:25 P.M., on January 12, 1975, Mr. Corcelli, the dispatcher of the Silver Top Cab Company, sent a cab operated by Mr. John Mulvaney to pick up the fare at 105 Comstock (R. 219). Mr. Hawkins testified that the defendant was carrying something rolled up in a blue and white floral blanket which he "cradled in his arms" (R. 193, 197). He identified the blanket at the trial (R. 193, 194). Thereafter, Mr. Hawkins saw a Silver Top Cab pull up and observed the respondent place the blanket in the back seat before getting into the front seat of the cab (R. 195). Mr. Hawkins then heard him say he was going to Prairie Avenue, No. 228 or 218 (R. 196)

After picking up Innis, John Mulvaney radioed the dispatcher to inform him he was going to East Greenwich, Rhode Island, and not to Prairie Avenue in Providence, as previously indicated (R. 219). This was the last anyone heard from Mr. Mulvaney (R. 225).

Four days later, on the morning of January 16, 1975, cab No. 21 was found approximately one-quarter mile off Weaver

Hill Road — a desolate country road in the heavily wooded area of Coventry, Rhode Island. John Mulvaney's body was found in a shallow grave nearby (R. 65, 71, 75).

At the scene, the police found a blue and white blanket (R. 95), Mr. Mulvaney's wallet, and some personal papers (R. 100, 105, 109). The testimony did not reveal what the wallet contained other than personal papers. Mr. Corcelli testified that Mr. Mulvaney should have collected 21 or 22 dollars in fares prior to picking up Thomas Innis (R. 224), and that Mulvaney normally carried a flashlight, which was not found at the scene (R. 228-230).

At approximately 2:30 A.M. on January 13, 1975, Mr. Paul McQuaid of Conventry had been awakened by someone asking for directions to Weaver Hill Road. Mr. McQuaid testified that he had neither seen nor heard any vehicle approach his home (R. 241, 242, 244). He identified Innis as the person he saw that night (R. 239), and testified that Innis was carrying a flashlight similar in appearance to that carried by the victim (R. 236, 237).

At 4:00 A.M. the defendant next appeared at the home of Crawford A. Calder, Jr., located approximately one-quarter of a mile from the scene of the homicide (R. 250). The respondent told him that his car had broken down on Route 95. The respondent spent the remainder of the night there. The following morning Innis brought out a loaded sawed-off shotgun and showed it to Mr. Calder (R. 253). It was cut off at the stock and barrel with scoring marks on the side (R. 259). Mr. Calder was able to identify the gun at the trial (R. 409). The defendant gave him a flashlight and asked him to get rid of it (R. 251, 412). He identified it at trial (R. 413, 414). Mr. Calder was unable to melt it and at the suggestion of another friend contacted the police (R. 420).

Sometime during the early morning hours of January 13, 1975, Thomas Innis placed a call to the home of George Hull.

Priscilla Johnson, Hull's girlfriend, answered. Ms. Johnson testified that Innis told her that he had "to off that dude," which Ms. Johnson interpreted to mean that Thomas Innis "had to kill someone" (R. 271, 273). George Hull came to the phone and Innis asked him for a ride to Providence from Coventry (R. 285). When asked how he got to Coventry the respondent answered that he traveled by cab (R. 285). Hull also testified that Innis told him that the cab driver was giving the respondent some sort of problem and so he had "to dump him" (R. 286).

At approximately 4:30 A.M. on January 17, 1975, the respondent was apprehended on Chalkstone Avenue.

The respondent produced a witness from the phone company who testified that there were no outdoor phones within two or three miles of Weaver Hill Road (R. 488). A second witness testified that in the early morning of January 17, 1975, someone knocked on his door at 1624 Chalkstone Avenue in Providence and asked to call the police (R. 491). Another witness stated that George Hull had told him that he was testifying against Thomas Innis because the police were pressuring him (R. 496), and a final witness testified to the circumstances of an argument he observed between the defendant and George Hull (R. 500-501).

Conclusion.

For the reasons stated above, the State respectfully requests that the judgment of the Supreme Court of Rhode Island be reversed.

Respectfully submitted,

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